(2)

No. 03-1697

Supreme Court, U.S.
FILED
JUL 26 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

JARROD S. DOUDS, FRANKLIN M. DREES, VICTOR GOMEZ, SALVATORE S. MAZZA, KEVIN J. PETRY, CHARLES A. TRIGO, AND JOHN WOMACK,

Petitioners,

v.

JEANNETTE THOMPSON, AS PLENARY GUARDIAN OF ROBERT MAGYAR, AND CECILIA MAGYAR,

Respondents.

On Petition For A Writ Of Certiorari To The Florida District Court Of Appeal For The Second District

BRIEF IN OPPOSITION

STUART C. MARKMAN
JAMES E. FELMAN
Counsel of Record
KYNES, MARKMAN & FELMAN, P.A.
100 South Ashley Drive, Suite 1300
Tampa, Florida 33602
(813) 229-1118

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether law enforcement officers' use of force capable of causing serious injury to detain an individual is unreasonable when there is no reason to suspect the individual has committed a crime, the individual is being detained only for his own safety and poses no immediate threat to the officers or others, and the use of force continues after the individual is handcuffed, bound, and face down on the ground?

2. Whether the Florida Second District Court of Appeal's resolution of the qualified immunity claims otherwise conflicts with federal law?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 2

REASONS FOR DENYING THE PETITION 7

I. The Decision of the Florida Second District Court of Appeal That Petitioners' Use of Force Capable of Causing Serious Injury to Detain Mr. Magyar Was Unreasonable and Violated Mr. Magyar's Constitutional Rights When Mr. Magyar Had Committed No Crime and Was Being Detained Only for His Own Safety, Mr. Magyar Posed No Immediate Threat to Petitioners or Others, and the Use of Force Continued After Mr. Magyar Was Handcuffed, Bound, and Face Down on the Ground, Does Not Conflict with Federal Law 7

A. The Second District was consistent with federal caselaw when it held that the fact Mr. Magyar had committed no crime weighed against the use of force to detain him 9

B. The Second District was consistent with federal caselaw when it held that the fact Mr. Magyar posed no immediate threat to the safety of Petitioners or others weighed against the use of force to detain him 13

C. The Second District was consistent with federal caselaw when it held that Mr. Magyar's resistance did not justify the level of force used against him 15

TABLE OF CONTENTS – Continued

Page

II. The Florida Second District Court of Appeal's Holding that Petitioners Are Not Entitled to Qualified Immunity Does Not Otherwise Conflict with Federal Law 17

CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES

Adams v. Metiva, 31 F.3d 375 (6th Cir. 1994) 13

Alexis v. McDonald's Rests., Inc., 67 F.3d 341 (1st Cir. 1995) 13

Bailey v. Kennedy, 349 F.3d 731 (4th Cir. 2003) 10, 14, 16, 20

Deorle v. Rutherford, 272 F.3d 1272 (9th Cir. 2001) 10, 11, 15

Drummond ex rel. Drummond v. City of Anaheim, 343 F.3d 1052 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 2871 (2004) 10, 15, 16, 18, 20

Durruthy v. Pastor, 351 F.3d 1080 (11th Cir. 2003) 12

Graham v. Connor, 490 U.S. 386 (1989) ..... *passim*

Hope v. Pelzer, 536 U.S. 730 (2002) 20, 21

Jones v. Buchanan, 325 F.3d 520 (4th Cir. 2003) 19

LaLonde v. County of Riverside, 204 F.3d 947 (9th Cir. 2000) 13

Lee v. Ferraro, 284 F.3d 1188 (11th Cir. 2002) 13

Ludwig v. Anderson, 54 F.3d 465 (8th Cir. 1995) 10, 21

Marsall v. City of Portland, 2004 WL 1048127 (D. Ore. May 7, 2004) 11

Rowland v. Perry, 41 F.3d 167 (4th Cir. 1994) 13

Santos v. Gates, 287 F.3d 846 (9th Cir. 2002) 13

Saucier v. Katz, 533 U.S. 194 (2001) 3, 8, 16, 17

State v. Moore, 791 So. 2d 1246 (Fla. 1st Dist. Ct. App. 2001) 12

TABLE OF AUTHORITIES – Continued

Page

Thomas v. State, 614 So. 2d 468 (Fla. 1993) 12

Thornton v. City of Macon, 132 F.3d 1395 (11th Cir. 1998) 13, 18

Vinyard v. Wilson, 311 F.3d 1340 (11th Cir. 2002) 13

STATUTES

42 U.S.C. § 1983 1

Fla. Stat. § 316.130 12

Fla. Stat. § 901.15 12

BRIEF IN OPPOSITION

The Respondents, Jeannette Thompson, as Plenary Guardian of Robert Magyar, and Cecilia Magyar, respectfully request that this Court deny the petition for a writ of certiorari, seeking review of the opinion of the Florida Second District Court of Appeal in this case. That opinion is reported at 852 So. 2d 299 (Fla. 2d Dist. Ct. App. 2003), *review denied by* 871 So. 2d 872 (Fla. 2004).

STATEMENT OF THE CASE

Respondents Jeanette Thompson, as Plenary Guardian of Robert Magyar, and Cecilia Magyar [referred to collectively as "Mr. Magyar"], sued Petitioners, City of Tampa Police Department Officers Jarrod S. Douds, Franklin M. Drees, Victor Gomez, Salvatore S. Mazza, Kevin J. Petry, Charles A. Trigo, and John Womack [referred to collectively as "Petitioners"], as well as the City of Tampa, in the Circuit Court of the Thirteenth Judicial Circuit, in and for Hillsborough County, Florida. The City of Tampa is not a party to this appeal. Mr. Magyar asserted a claim under 42 U.S.C. Section 1983 alleging that Petitioners violated his rights under the First, Fourth, Fifth, and Fourteenth Amendments to the United States Constitution by using excessive force to detain him. Mr. Magyar also raised a state law battery claim against Petitioners based on their use of excessive force.

As to Mr. Magyar's Section 1983 claim, the trial court held that Mr. Magyar failed to establish that Petitioners used excessive force or violated clearly established law because "[a]ll of the cases cited by the Plaintiff have facts materially different from the facts" of this case. Pet'rs'

App. 7b. The trial court accordingly granted summary judgment in favor of Petitioners on qualified immunity grounds. Pet'rs' App. 7b.

The Florida Second District Court of Appeal reversed the trial court's grant of summary judgment in favor of Petitioners. The court analyzed whether Petitioners' use of force against Mr. Magyar was reasonable using the balancing test set forth by this Court in *Graham v. Connor*, 490 U.S. 386, 396 (1989). Pet'rs' App. 9a-11a. It held that under the considerations set forth in *Graham*, "the individual officers used unreasonable force in detaining Magyar." Pet'rs' App. 11a. The Second District then considered whether the constitutional right Petitioners violated was clearly established. It held that "the law at the time of the incident was sufficiently clear to give the individual officers fair warning that their actions violated Magyar's constitutional rights." Pet'rs' App. 12a. For these reasons, the court concluded, "the trial court erred in granting final summary judgment in favor of the individual officers on this issue." Pet'rs' App. 15a.

The Florida Second District Court of Appeal denied rehearing and the Florida Supreme Court denied Petitioners' petition for review. Pet'rs' App. 21a, 1c.

STATEMENT OF FACTS

Petitioners' Statement of Facts omits most of the record evidence supporting the Florida appellate court's holding that Petitioners are not entitled to qualified immunity. Respondents accordingly submit the following statement of facts which, as the law requires, is presented

in the light most favorable to Mr. Magyar. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001).

This case involves an encounter between a citizen who had committed no crime and seven law enforcement officers who, under the guise of detaining him "for his safety," performed a combination of "leg sweeps," "tackles," "pain compliance techniques," "hammer fists," and "knee blasts," combined with the use of handcuffs and a "hobble tie," which rendered him permanently and severely brain damaged and reduced to future existence in an unconscious vegetative state. This record presents an overwhelming factual basis for the denial of qualified immunity under established law.

Around 11 p.m. on October 18, 1998, Mr. Magyar was stopped by Officer Salvatore Mazza of the Tampa Police Department while walking across Interstate 275 in Tampa, Florida. Pet'rs' App. 2a; R. 220-21. Although Mr. Magyar was crossing the interstate, he seemed to the officer to be unaware of the traffic. Pet'rs' App. 2a. Officer Mazza thought he was incoherent and confused. R. 221, 1427. When the officer confronted Mr. Magyar, he explained that he was a diabetic with high blood pressure, that his blood sugar was high and he was not feeling well, and that he was walking to the hospital. Pet'rs' App. 2a; R. 221, 1176. At Officer Mazza's request, Mr. Magyar got into the officer's patrol car. Pet'rs' App. 2a. Officer Mazza took Mr. Magyar off the interstate to an abandoned gas station, where the officer called for an ambulance. Pet'rs' App. 2a.

While waiting for the ambulance, Mr. Magyar made statements indicating he believed Officer Mazza wished to hurt him. Pet'rs' App. 2a. When Mr. Magyar later told

Officer Mazza he felt ill, the officer let him out of the patrol car. Pet'rs' App. 2a. Mr. Magyar sat down on one of the abandoned gas station's pump islands. Pet'rs' App. 2a.

After a period of time had passed and the requested ambulance had not arrived, Officer Mazza called to check on its status. Pet'rs' App. 2a, R. 222. Another City of Tampa police officer, Sergeant Franklin Drees, heard Officer Mazza's call and went to the abandoned station. Pet'rs' App. 2a-3a. Mr. Magyar was still seated at the pump island when Sergeant Drees arrived. Pet'rs' App. 3a. While seated, Mr. Magyar continued to make statements indicating he believed the officers wanted to hurt him. Pet'rs' App. 3a.

Eventually, Mr. Magyar got up and began walking away. Pet'rs' App. 3a. Mr. Magyar's home was only three blocks away from the abandoned gas station where Officer Mazza had taken him to wait for the ambulance. Pet'rs' App. 3a n.1. When Officer Mazza ordered Mr. Magyar to stop, he returned and again sat at the pump island. Pet'rs' App. 3a. According to the officers, Mr. Magyar was not suspected of any crime, but was being detained "for his safety." R. 277, 1173, 1190-91, 1433, 1440. A short time later, Mr. Magyar got up again and began to walk away. Pet'rs' App. 3a. Although Officer Mazza ordered Mr. Magyar to stop, this time he continued walking away. Pet'rs' App. 3a.

In response, Officer Mazza and Sergeant Drees chased Mr. Magyar down and grabbed his arms. Pet'rs' App. 3a; R. 224, 1189, 1440. Mr. Magyar then began to struggle, saying that he had not done anything wrong and wanted to go home and pleading with the officers not to kill him. Pet'rs' App. 3a; R. 1441. Sergeant Drees used "leg sweeps"

on Mr. Magyar and Officer Mazza grabbed Mr. Magyar's leg and "tackled" Mr. Magyar to the ground. Pet'rs' App. 3a; R. 224, 238, 1191, 1444. Officer Mazza and Sergeant Drees continued to struggle with Mr. Magyar and eventually got him face down on the ground. Pet'rs' App. 3a; R. 1191-92. Officer Mazza was "on top" of Mr. Magyar during this struggle, while Sergeant Drees was either lying on top of Mr. Magyar or on the back of his shoulder, using his body weight to keep Mr. Magyar on the ground. Pet'rs' App. 3a, 4a; R. 247, 268, 280.

Sergeant Drees called for backup, and five Tampa Police Officers – Victor Gomez, Kevin Petry, Jarrod Douds, John Womack, and Charles Trigo – responded to the call. Pet'rs' App. 4a; R. 298. Each of these five additional officers contributed to the physical detention of Mr. Magyar. Officer Douds pinned Mr. Magyar's left shoulder with his leg and held Mr. Magyar's head down with his hand. Pet'rs' App. 4a; R. 247, 1342, 1344-45. Officer Douds also used "pain compliance techniques" against Mr. Magyar, delivering a "hammer fist" strike in the area of Mr. Magyar's shoulder blade, then digging his elbow and forearm into the same portion of Mr. Magyar's back. Pet'rs' App. 4a; R. 208, 248, 286, 289, 1346-48, 1373. Officer Petry grabbed one of Mr. Magyar's arms and brought it behind his back so Mr. Magyar could be handcuffed. R. 204, 1640. Officer Womack handcuffed Mr. Magyar's hands behind his back. R. 286-87, 1197-98. Officer Womack also used two or three "knee blasts" to get Mr. Magyar's legs down, sufficiently hard that Sergeant Drees felt the "jolt" to Mr. Magyar's body. Pet'rs' App. 4a; R. 225, 239, 281, 285, 286, 288-89. Officer Gomez lay across Mr. Magyar's legs and Officer Trigo straddled Mr. Magyar's lower legs. R. 196, 1373. Officer Trigo then retrieved "hobble tie" restraint ropes

and, with Officer Mazza by that time sitting across Mr. Magyar's lower back, buttocks, or legs, tied the ropes around Mr. Magyar's ankles. R. 226, 299, 307, 1198, 1585.

Even after Mr. Magyar was handcuffed and his legs were "hobble tied," he was kept face down with several officers lying across him until he "went limp." Pet'rs' App. 4a; R. 213, 256, 265, 287, 293, 1350. After Mr. Magyar went limp, the officers rolled him over. Pet'rs' App. 4a. At that point, Mr. Magyar was unresponsive and not breathing, and his lips were blue. Pet'rs' App. 4a; R. 205, 293, 1351, 1374. There were abrasions on Mr. Magyar's face and his nose was bleeding. Pet'rs' App. 4a-5a.

The ambulance arrived, and Mr. Magyar was taken to the hospital. At the time he arrived at the hospital, Mr. Magyar was in total cardiac and respiratory arrest. Pet'rs' App. 5a. His head was bleeding in at least five places, he had bruises all over his head, face, and arms, and there were fingernail gouges on his neck. R. 1035, 1242-43, 1688-90.

Since that night, Mr. Magyar has remained in a persistent vegetative state. Pet'rs' App. 5a. The multiple head wounds Mr. Magyar suffered continued to bleed for months. R. 1253. Later diagnostic tests indicated Mr. Magyar suffered from "severe and irreversible brain damage" caused by oxygen deprivation with the "contributing factors" of "body and head trauma." Appellant's Init. Br. at App. A.

REASONS FOR DENYING THE PETITION

I. The Decision of the Florida Second District Court of Appeal That Petitioners' Use of Force Capable of Causing Serious Injury to Detain Mr. Magyar Was Unreasonable and Violated Mr. Magyar's Constitutional Rights When Mr. Magyar Had Committed No Crime and Was Being Detained Only for His Own Safety, Mr. Magyar Posed No Immediate Threat to Petitioners or Others, and the Use of Force Continued After Mr. Magyar Was Handcuffed, Bound, and Face Down on the Ground, Does Not Conflict with Federal Law.

The Petition for a Writ of Certiorari should be denied. The Florida Second District Court of Appeal's holding that Petitioners are not entitled to qualified immunity conflicts with no federal caselaw. In an attempt to suggest a conflict exists, Petitioners resort to framing an issue that is presented neither by the opinion of the Second District nor by the record in this case: "Whether a law enforcement officer may lawfully seize a person, although that person has not committed a crime, if the officer has probable cause to believe that there is a substantial likelihood that the person is a danger to himself or others." Pet. Writ Cert. at i.

The question in this case is not whether the law permitted Petitioners to *seize* Mr. Magyar. Instead, the issue the Second District decided was whether the *amount of force* Petitioners used violated constitutional rights that were clearly established at the time of the seizure. Once the issue is accurately framed, it is immediately apparent that Second District's resolution of that issue was required by, not in conflict with, the established law.

The Second District's opinion is a straightforward application of the law established in *Saucier v. Katz*, 533 U.S. 194 (2001), and *Graham v. Connor*, 490 U.S. 386 (1989). *Saucier* held that when a court determines whether a defendant is entitled to qualified immunity, it must consider two questions: (1) whether "[t]aken in the light most favorable to the party asserting the injury, . . . the facts alleged show the officer's conduct violated a constitutional right" and, if so, (2) "whether the right was clearly established." 533 U.S. at 201. At the first step of the *Saucier* analysis in an excessive force case, *Graham* requires courts to determine "whether the force used to effect a particular seizure is 'reasonable'" – and therefore whether the facts alleged show a constitutional violation – by weighing "'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Graham*, 490 U.S. at 396 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)). The proper application of this balancing test "requires careful attention to the facts and circumstances of each particular case, including [1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.*

After undertaking a detailed analysis according to the framework in *Saucier* and *Graham*, the Second District held Petitioners are not entitled to qualified immunity on Mr. Magyar's excessive force claim as a matter of law. Pet'rs' App. 8a-15a. As explained below, the Second District's application of the established law was correct and consistent with federal caselaw.

A. The Second District was consistent with federal caselaw when it held that the fact Mr. Magyar had committed no crime weighed against the use of force to detain him.

The Second District properly concluded that the first *Graham* factor, "the severity of the crime at issue," weighed against the force used to detain Mr. Magyar. The court stated:

> First, Magyar was not suspected of committing any crime. At the most, he had committed an infraction that would subject him to a civil citation but not detention. At the least, he was simply waiting voluntarily with the police for an ambulance to arrive. When no crime has been committed, this fact weighs heavily in favor of finding the use of force excessive. Because serious force is appropriate for a more serious crime and less force is appropriate for a less serious offense, the fact that Magyar had committed no offense at all militates against the use of any force – much less the force used in this case to effect Magyar's detention. That Magyar was a "big guy" . . . is irrelevant because the use of force was improper ab initio.

Pet'rs' App. 10a (citation omitted).

Petitioners contend the Second District failed to address their argument that Mr. Magyar was properly detained because they had probable cause to believe he was a danger to himself and others. Pet. Writ Cert. at 13-15. In support of that argument, Petitioners cite a line of cases holding that the Fourth Amendment allows an officer with probable cause to believe a person is a danger to himself or others to seize that person. Pet. Writ Cert. at 13-14.

Petitioners' argument overlooks the issue in this case, which is not whether Petitioners had probable cause to seize Mr. Magyar, but whether the force they used to detain him was so unreasonable as to violate Mr. Magyar's constitutional rights. *Graham*'s balancing test must be applied to "*all* claims that law enforcement officers have used excessive force . . . in the course of an arrest, investigatory stop, or other 'seizure.'" 490 U.S. at 395 (emphasis in original). Consistent with this requirement, the federal courts apply *Graham* to determine whether the level of force used to detain a mentally ill person was reasonable. *See, e.g.*, *Bailey v. Kennedy*, 349 F.3d 731, 743-44 (4th Cir. 2003); *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1056-59 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 2871 (2004); *Deorle v. Rutherford*, 272 F.3d 1272, 1280-85 (9th Cir. 2001).

Just as the Second District did, courts applying *Graham* to determine the reasonableness of the force used to detain a mentally ill person give great weight to the fact that the detained individual has committed no crime. *Bailey*, 349 F.3d at 743-44; *Drummond*, 343 F.3d at 1057; *Deorle*, 272 F.3d at 1280, 1282. "The character of the offense is often an important consideration in determining whether the use of force was justified." *Deorle*, 272 F.3d at 1280. Where "the person seized is not a 'suspect' [and] has committed no crime when the police approach, . . . the 'importance of the governmental interests alleged to justify the intrusion' is necessarily diminished." *Ludwig v. Anderson*, 54 F.3d 465, 471 (8th Cir. 1995) (quoting *Garner*, 471 U.S. at 9).

If anything, the fact that Petitioners believed Mr. Magyar to be mentally ill required them to be more cautious in their use of force. "When police are confronted by

an unarmed, emotionally distraught individual who has committed no serious crime, . . . the governmental interest in using force is diminished, not strengthened, even when the suspect is irrational and inviting the use of force." *Marsall v. City of Portland*, 2004 WL 1048127, at *11 (D. Ore. May 7, 2004); *see also Deorle*, 272 F.3d at 1283 ("where it is or should be apparent to the officers that the individual involved is emotionally disturbed, that is a factor that must be considered in determining, under *Graham*, the reasonableness of the force employed"). Whether or not Petitioners had probable cause to seize Mr. Magyar, the Second District was correct and perfectly consistent with federal caselaw when it recognized that the fact he had committed no crime weighed against the use of force to detain him.

Petitioners also argue that the Second District failed to address the possibility that Mr. Magyar's detention may have been justified by his violation of Florida traffic control laws. Pet. Writ Cert. at 17. Because Florida Statutes section 901.15(5) "authorizes a Florida law enforcement officer to arrest an individual he witnesses violating" a traffic control statute, Petitioners' argument runs, "another reason that Mr. Magyar's constitutional right to be free from illegal seizure was not violated is because Officer Mazza had statutory authority to arrest Mr. Magyar after he saw him walking in the middle of the highway." Pet. Writ Cert. at 17.

Petitioners' argument fails for at least three reasons. First, it is directly contradicted by Petitioners' own testimony. According to that testimony, Mr. Magyar was detained "for his safety," not because he was suspected of a crime. R. 277, 1173, 1190-91, 1433, 1440.

Second, Petitioners misapprehend the law in Florida regarding the level of detention that can be imposed for the type of traffic infraction they say Mr. Magyar committed. Under Florida law, a violation of the requirement that pedestrians walking on a highway "shall, when practicable, walk only on the shoulder on the left side of the roadway" is a "noncriminal traffic infraction." Fla. Stat. § 316.130(4), (19). The rule in Florida is that section 901.15 permits an "arrest" for a noncriminal traffic infraction only "for the limited purpose of issuing a ticket, summons, or notice to appear." *Thomas v. State*, 614 So. 2d 468, 471 (Fla. 1993); *see also State v. Moore*, 791 So. 2d 1246, 1249 (Fla. Ct. App. 2001).[1] Had Petitioners' reason for detaining Mr. Magyar really been their suspicion that he was walking on the wrong part of the roadway, they would have been required to release him once he had been given a citation. They would not have been permitted to sweep his legs out from under him, tackle him, force him to the ground, use pain compliance techniques and deliver a "hammer fist blow" to him, handcuff him behind his back, administer "knee blasts" to him, straddle him, "hobble tie" him, and lay across him until his body went limp.

---

[1] Petitioners rely on *Durruthy v. Pastor*, 351 F.3d 1080 (11th Cir. 2003), for the proposition that section 901.15(5) authorized Mr. Magyar's arrest for violating a Florida traffic control statute. Pet. Writ Cert. at 17. *Durruthy* does not involve an arrest for walking on a highway. 351 F.3d at 1085-86. To the extent the Eleventh Circuit's holding in *Durruthy* could be read broadly to suggest section 901.15(5) authorizes a custodial arrest for any noncriminal infraction under Florida's traffic control statutes, such a holding would conflict with the Florida Supreme Court's interpretation of that statute.

Third, Petitioners' argument misses the issue – again. The question is not whether Petitioners had reason to detain Mr. Magyar, but whether the level of force used to detain him was reasonable. The federal courts consistently hold that little or no force is justified to detain an individual suspected of a non-serious offense. *See, e.g., Vinyard v. Wilson*, 311 F.3d 1340, 1347 (11th Cir. 2002); *Santos v. Gates*, 287 F.3d 846, 854 (9th Cir. 2002); *Lee v. Ferraro*, 284 F.3d 1188, 1198 (11th Cir. 2002); *LaLonde v. County of Riverside*, 204 F.3d 947, 959 (9th Cir. 2000); *Thornton v. City of Macon*, 132 F.3d 1395, 1400 (11th Cir. 1998); *Alexis v. McDonald's Rests., Inc.*, 67 F.3d 341, 353 (1st Cir. 1995); *Rowland v. Perry*, 41 F.3d 167, 174 (4th Cir. 1994); *Adams v. Metiva*, 31 F.3d 375, 385 (6th Cir. 1994).

Accordingly, when the Second District held that "the fact that Magyar had committed no offense at all militates against the use of any force – much less the force used in this case," Pet'rs' App. 10a, it was in step with the federal caselaw. There is no jurisdiction-vesting conflict in this case.

B. The Second District was consistent with federal caselaw when it held that the fact Mr. Magyar posed no immediate threat to the safety of Petitioners or others weighed against the use of force to detain him.

The second *Graham* factor is "whether the suspect poses an immediate threat to the safety of the officers or others." 490 U.S. at 396. In applying that factor, the Second District held that it too weighed against the use of force to detain Mr. Magyar:

> Second, taking the evidence in the light most favorable to [the Plaintiffs], Magyar did not pose an immediate threat to either the officers or others. Clearly, when Magyar walked quickly away from the officers, he posed absolutely no threat to them. Further, there is no evidence that Magyar posed any immediate threat to others. While the individual officers asserted that Magyar *might* have been heading back to the interstate where he *might* have caused an accident which *might* have injured others, this chain of speculation does not establish that Magyar posed an *immediate* threat to either others or himself. Further, the individual officers' assertion that Magyar's health might have resulted in him falling into a diabetic coma on the side of the road cannot change the fact that their use of force was unreasonable. As noted in *Graham*, the officers' good intentions cannot make the use of unreasonable force constitutional.

Pet'rs' App. 10a-11a (emphasis in original).

Petitioners contend that the Second District "second-guessed the Officers' decision in light of 20/20 hindsight and found their fear that Mr. Magyar might hurt himself or others was too speculative." Pet. Writ Cert. at 15. Not so. The Second District correctly recognized that the second *Graham* factor requires consideration of whether the detainee "poses an *immediate* threat to the safety of the officers or others." 490 U.S. at 396 (emphasis added); *see also Bailey*, 349 F.3d at 744 (second *Graham* factor weighed against use of force where unarmed detainee was not "an immediate threat to himself or the officers"). In this case, Mr. Magyar presented no immediate threat to Petitioners or others. He was unarmed and off of the highway at the time he was forcibly restrained. As the

Second District explained, any concern he might cause an accident rested on a chain of speculation and was not an "immediate threat." Pet'rs' App. 10a. "A desire to resolve quickly a potentially dangerous situation is not the type of governmental interest that, standing alone, justifies the use of force that may cause serious injury." *Deorle*, 272 F.3d at 1281.

Nor did the possibility Mr. Magyar was a danger to himself justify the force used to detain him. Where the person seized is "a mentally disturbed individual not wanted for any crime, who was being taken into custody to prevent injury to himself[, d]irectly causing him grievous injury does not serve that objective in any respect." *Drummond*, 343 F.3d at 1059. "Protecting" Mr. Magyar did not require tackling him, inflicting "pain compliance techniques," delivering a "hammer fist" blow, "hobble tying" him, or holding him face down on the ground with such force that he was rendered unconscious.

C. The Second District was consistent with federal caselaw when it held that Mr. Magyar's resistance did not justify the level of force used against him.

As to the third *Graham* factor, whether Mr. Magyar was "actively resisting arrest or attempting to evade arrest by flight," the Second District stated:

> Third, while there is evidence to show that Magyar was resisting the officers' efforts to detain him, this fact simply does not warrant the amount of force used in this case. The evidence shows that the officers continued to exert force against Magyar even after he was handcuffed and after his legs were bound with rope. The use

> of the officers' body weight to prevent Magyar from rolling when he was already handcuffed and bound was simply not necessary to effect his detention or to prevent harm to the officers or others.

Pet'rs' App. 11a.

Petitioners do not directly address the Second District's analysis of the third *Graham* factor. Instead, they attempt to sidestep the issue based on their assertion that because the court "failed to correctly apply the *Saucier* analysis and failed to directly address whether Officer Mazza and Sergeant Drees had probable cause to detain Mr. Magyar, the balance of [the] court's application of the *Graham* test is undeniably and irreconcilably skewed against a finding of qualified immunity for any of the Officers." Pet. Writ Cert. at 15.

As discussed above, the Second District applied *Saucier* and *Graham* to the real issue in this case, which is whether the force used to detain Mr. Magyar was excessive. Just as that application was correct and consistent with federal caselaw with respect to the first and second *Graham* factors, it is correct and consistent with the third. Mr. Magyar's resistance when Petitioners seized him, especially after his hands were cuffed and his feet were bound, did not begin to justify the level of force Petitioners used. *See Bailey*, 349 F.3d at 744 (holding the third *Graham* factor did not weigh completely against the detained individual when he initially resisted arrest but "was not resisting arrest when he was bound hand and foot and lying face down on the floor"); *Drummond*, 343 F.3d at 1058 ("All three *Graham* factors would have permitted the use of only minimal force once [the detainee] was handcuffed and lying on the ground").

Petitioners used so much force on an unarmed, handcuffed, and bound man who was suspected of no crime that he was left in a permanent vegetative state. The Second District's conclusion that "the individual officers used unreasonable force in detaining Magyar," Pet'rs' App. 11a, came only after it applied the three *Graham* factors in a way that was both correct and consistent with federal caselaw.

II. The Florida Second District Court of Appeal's Holding that Petitioners Are Not Entitled to Qualified Immunity Does Not Otherwise Conflict with Federal Law.

Petitioners' second issue is a laundry list of complaints about the Second District's opinion. None presents an error by the Second District, much less a conflict with federal law.

Petitioners first argue that the Second District's opinion conflicts with *Saucier* because it does not separately analyze each Petitioner's entitlement to qualified immunity. According to Petitioners, the Second District "failed to specify" in its opinion what actions Officer Petry or Officer Trigo took that violated Mr. Magyar's constitutional rights and failed to explain in detail what actions Officer Gomez took that precluded him from being entitled to qualified immunity. Pet. Writ Cert. at 19.

The real significance of Petitioners' complaint that the Second District failed to detail the actions of Officers Petry, Trigo, and Gomez is what it does *not* contain: an argument that the record shows these officers did not participate in the use of force to detain Mr. Magyar. No such argument could succeed. The record shows that all

three of these officers actively participated in the forcible detention of Mr. Magyar. Officer Petry helped to handcuff Mr. Magyar's arms; Officer Gomez laid across Mr. Magyar's legs; and Officer Trigo first straddled Mr. Magyar's lower legs, then retrieved a "hobble tie" rope and used it to tie Mr. Magyar's ankles. R. 196, 204, 226, 299, 307, 1198, 1373, 1585, 1640.

Petitioners cite no case suggesting that the Second District was required to detail every action by each officer denied qualified immunity. There is no requirement under federal or Florida law that an appellate court reviewing a qualified immunity decision must set out factual findings as to each officer claiming qualified immunity. To the contrary, it is not unusual for appellate opinions addressing immunity claims by groups of officers to decline to specifically discuss the actions of each officer. *See, e.g., Drummond*, 343 F.3d 1054-55, 1063 (denying qualified immunity to four officers; discussing specifically actions of only two); *Thornton*, 132 F.3d at 1398, 1400 (holding three officers not entitled to qualified immunity as to excessive force claim; detailing actions of only one).

Petitioners' related complaint that the Second District "fails to specify what portions of the record it relies upon" to conclude Petitioners were not entitled to qualified immunity, Pet. Writ Cert. at 21, is also unfounded. There is no requirement under Florida or federal law that an appellate opinion cite the specific portions of the record it relies on in resolving a qualified immunity claim.

Petitioners also assert that the Second District failed to analyze the reasonableness of Petitioners' actions from the individual perspective of each officer before holding

they were not immune. Pet. Writ Cert. at 19-20. That contention fails for two reasons.

First, it is apparent from the Second District's opinion that the court considered the objective reasonableness of each officer's actions. The Second District stated that "the reasonableness test is an objective one." Pet'rs' App. 9a (citing *Graham*, 490 U.S. at 397). It considered Petitioners' actions under *Graham*'s three-factor balancing test, and held that "the facts as alleged support a finding that *the individual officers* violated Magyar's Fourth Amendment rights." Pet'rs' App. 10a-11a (emphasis added). The Second District went on to consider "whether *the individual officers* should have known based on the state of the law at the time of the incident that their actions violated Magyar's Fourth Amendment rights." Pet'rs' App. 11a (emphasis added). Following a detailed analysis of the law at the time Mr. Magyar was detained, the Second District concluded that "[b]ecause the facts alleged by [the Plaintiffs] show the violation of a constitutional right and because that right was sufficiently clearly established for *the individual officers* to have fair warning that their conduct was unlawful, the trial court erred in granting final summary judgment in favor of the individual officers on this issue." Pet'rs' App. 11a-15a (emphasis added).

Second, the Second District's conclusion that none of the Petitioners is entitled to qualified immunity is consistent with federal caselaw. "[C]ourts have consistently applied" *Graham*'s objective reasonableness standard "and have consistently held that officers using unnecessary, gratuitous, and disproportionate force to seize a secured, unarmed citizen, do not act in an objectively reasonable manner and, thus, are not entitled to qualified immunity." *Jones v. Buchanan*, 325 F.3d 520, 532 (4th Cir. 2003).

Each of the Petitioners participated in the forcible detention that left Mr. Magyar in a permanent vegetative state. Federal cases hold law enforcement officers are not entitled to qualified immunity under strikingly similar circumstances. In *Drummond*, for example, the court held that officers who "were called to take a mentally ill individual into custody for his own safety, but within a half-hour, . . . had caused him to fall into a coma that has left him in a permanent vegetative state" by using their body weight to hold him face down after he was already handcuffed "had 'fair warning' that the force they used was constitutionally excessive." 343 F.3d at 1061, 1063. "*Any* reasonable officer," the *Drummond* court stated, "should have known that such conduct constituted the use of excessive force." *Id.* at 1061 (emphasis in original). Similarly, the *Bailey* court held the officers "violated clearly established law in using force to seize [a mentally ill individual] when he had committed no crime and when they had no reason to believe he was a danger to himself or others." 349 F.3d at 745. "It was especially clear that they were not entitled to use force after [the detainee] was secured face down on the floor in handcuffs and leg restraints." *Id.*

Finally, Petitioners argue that instead of resolving the qualified immunity issues, the Second District should have remanded the case to the trial court for reconsideration under the correct legal standard as set forth in *Hope v. Pelzer*, 536 U.S. 730 (2002). Pet. Writ Cert. at 20-21. Petitioners are mistaken. Remand was not only unnecessary, it would have caused further delay and waste of judicial resources.

In that regard, the trial court granted summary judgment in favor of the officers based in part on its

holding that "[a]ll of the cases cited by the Plaintiff have facts materially different from the facts" of this case. Pet'rs' App. 7b. Shortly thereafter, this Court held in *Hope* that "cases with 'materially similar' facts" are not necessary to a finding that a constitutional right is clearly established. 536 U.S. at 741. Although the Second District recognized that the trial court applied the wrong legal standard, it declined to remand the case for reconsideration under *Hope* "because it is clear from the record that the individual officers are not entitled to qualified immunity as a matter of law at this stage of the proceedings." Pet'rs' App. 8a.

Petitioners do not and cannot argue the Second District was required to remand the case rather than decide the qualified immunity issue itself. Qualified immunity issues are reviewed *de novo*. *Ludwig*, 54 F.3d at 470. The Second District was in as good a position as the trial court to determine whether Petitioners were entitled to summary judgment. Further, as the Second District recognized, the *Hope* decision did not announce a new rule, but was "based on prior precedent from the Supreme Court." Pet'rs' App. 8a. In fact, in *Hope* the Supreme Court reversed outright decisions granting summary judgment based on qualified immunity. 536 U.S. at 748. It did not remand the case for reconsideration, and there was no need for the Second District to do so either.

The reversal in this case was both correct and judicially economical. Petitioners suggest a remand would have allowed the trial court to "further develop the record as to the individual Officers' actions, if necessary." Pet. Writ Cert. at 21. But the record in this case is already thousands of pages long. It contains, among other things, the transcripts of the internal affairs interviews of each

Petitioner, transcripts of each Petitioner's deposition, and Petitioners' responses to the Plaintiffs' requests for admissions. There was ample evidence in the record for the Second District to decide the qualified immunity issue.

Petitioners complain that the events of October 18, 1998, "have occupied a part of their lives for close to six (6) years." Pet. Writ Cert. at 9. Mr. Magyar's life was effectively ended six years ago by Petitioners' unconstitutional actions, but his case has yet to go to trial, and he has yet to receive compensation for his grievous injuries. The Second District's decision to avoid further delay was appropriate and just.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

STUART C. MARKMAN
Florida Bar No. 0322571
JAMES E. FELMAN
FLORIDA BAR NO. 0775568
Counsel of Record
KYNES, MARKMAN & FELMAN, P.A.
100 South Ashley Drive,
Suite 1300
Tampa, Florida 33602
Telephone:(813) 229-1118
Facsimile:(813) 221-6750

Counsel for Respondents